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NTSB Order No. EA-4320

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of January, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. WEBSTER B. TODD, Respondent.	)	Docket SE-13220

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, rendered on January 6, 1994, at the conclusion of a two-day evidentiary hearing.[1] The law judge affirmed, by that decision, an order of the Administrator charging respondent with violations of sections

[1]An excerpt from the hearing transcript containing the initial decision is attached. Respondent filed a brief on appeal, to which the Administrator replied.

91.119(c), and 91.13(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).[2] The charges resulted from three alleged incidents of respondent operating a Piper PA-18 aircraft closer than 500 feet to persons and property.

After consideration of the briefs of the parties and the record, the Board concludes that safety in air commerce or air transportation and the public interest require that, for the reasons discussed below, respondent's appeal be granted in part. The proposed sanction of 180 days' suspension is, however, affirmed.[3]

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[2]These regulations state as follows:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * * *

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

[3]The Administrator has moved to strike documents that respondent included with his appeal brief under the title "Excerpts of Record," because these documents were not introduced or admitted into the record at the hearing. These documents, including a magazine article and information regarding a congressional inquiry, are not relevant to the Board's review of the matter and are not part of the record. Therefore, they were not considered by the Board in reaching its decision.

Respondent's motion for oral argument is denied. We have

As alleged by the Administrator in his suspension order (complaint), respondent deliberately operated N3DT (an aircraft registered to Blackacre Land Company, of which respondent is president) on October 25, 26, and November 13, 1992, near Winifred, Montana, at a distance of less than 500 feet from hunters and at least one vehicle. The Administrator's case was supported by the testimony of five eyewitnesses. The law judge affirmed the Administrator's order, making a credibility finding in favor of the Administrator's witnesses.

October 25-26 incidents

Blackacre Land Company owns PN Ranch, a 66 square mile property that, near the location where all the alleged incidents took place, borders both state and federal land. Douglas Tacia, Reed Tacia, and Stanley Grovdahl testified that they were hunting on October 25 and 26 east of PN Ranch. The vegetation in that area was sparse: no trees, only knee-high sage brush. When hunting, they all wore bright orange vests.

Douglas Tacia stated that shortly before sunrise on October 25, a single engine, high wing, two-toned aircraft flew toward his truck, which was parked on the state road. He estimated that the aircraft flew within 100 feet of the truck and then circled over him five or six times at a low level. Stan Grovdahl testified that the aircraft then flew within about 75 feet of him and, on the third pass over him, the pilot opened the window of

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considered the arguments presented in the briefs and have reviewed the entire record. We do not believe our disposition of this case would be aided by the presentation of oral argument.

the aircraft with his right hand, and yelled to Mr. Grovdahl that he was trespassing. According to the testimony of Reed Tacia, on October 25, he observed a small, light-colored aircraft with wings above the cab fly within 150 feet of him. He stated that the aircraft was close enough to enable him to see the pilot's eyeglasses. On October 26, Reed Tacia saw the same aircraft make two passes within approximately 75 feet of him.

Respondent testified that he lives on PN Ranch and operates N3DT every morning over the ranch, weather permitting, for "cattle management purposes." He usually operates the aircraft below 300 AGL, in part because "there shouldn't be anybody else on the ranch." (Transcript (Tr.) at 252-53.) Respondent acknowledged that while flying on the morning of October 25 looking for some lost cattle, he saw two trucks and some people. He stated that he dropped down to look at one of the trucks because he did not recognize it. He circled around one person on BLM[4] land and saw a second individual further north on deeded land. He readily admitted that he opened the window of the aircraft and hollered out to the man that he was trespassing. (Tr. at 269.) Respondent maintained that he was 450-500 yards away from the person when this occurred and assumed the man heard him because he started walking towards the BLM land. The morning of October 26, respondent remembered flying around one person on BLM land, but stated that he circled only once and did not get within 500 feet of him. According to respondent, the Judith

[4]Bureau of Land Management.

River Landing area where these events occurred is often a source of confusion among hunters in that there is federal land, state land, and land belonging to the PN Ranch all in close proximity. The "exclusiveness of the hunting on the ranch" is extremely important to the ranch's hunting clients; therefore, respondent seeks to ensure the "best and most exclusive hunting" that the ranch can offer. (Tr. at 293-94.)

November 13 incident

David and Judy Burns were hunting in the vicinity of the Judith River Landing on November 13, 1992. Both testified that they observed a cream-colored, two-toned small aircraft flying with one occupant that morning. According to their statements, Mrs. Burns had climbed up a steep hill when the aircraft circled over her several times at a low altitude.[5] Mr. Burns estimated that the aircraft had been at a distance of about 70 to 80 feet from his wife. He stated that he observed and wrote down the aircraft identification number.[6] Respondent testified that he could not remember whether he flew at all on that date. According to his calendar, he had an appointment in Livingston that day, a four-hour drive from the ranch, but he could not say with certainty whether he operated the aircraft, was in Livingston, or both. (Tr. at 283.) When asked whether his pilot

[5]Mrs. Burns thought the aircraft was close enough that she could have hit it with a rock, a distance that she estimated to be about 50 feet.

[6]The number he copied was N3DT. (Tr. at 197.) FAA registration records indicate that N3DT is registered to Blackacre Land Company.

logbook indicated that he flew on November 13, respondent replied that he did not know; he had not looked at his logbook for a long time and, in any event, he logs monthly summaries based on tachometer time rather than individual flight entries. (Tr. at 301.) There was only one other person on the ranch that was authorized to operate the aircraft, and that pilot would mark the tachometer times for the flight whenever he used the plane. This individual did not testify at the hearing. Respondent stated that he had neither asked, nor been told, whether someone else operated the aircraft on November 13. (Tr. at 284, 301.)

On appeal, respondent asserts that the Administrator failed to prove the charges by a preponderance of the evidence, contending that the law judge should have accorded more weight to respondent's testimony than to that of the Administrator's witnesses, given his vast aviation experience, ability, and record of safety advocacy. Respondent further argues that, as to the November 13 incident, the evidence did not positively place him in the aircraft at the time of the incident.

It is well-settled that a law judge's credibility determinations will not be disturbed, absent a showing that they were made in an arbitrary or capricious manner. Administrator v. Smith, 5 NTSB 1560, 1563 (1986). Respondent has not so shown. Clearly, the "process of choosing between conflicting testimony" is subjective. Administrator v. Walker, 3 NTSB 1298, 1299 (1978). The law judge listened to the testimony and had the opportunity to evaluate the demeanor of the witnesses firsthand.

After doing so, he made a credibility finding in favor of the Administrator. We do not find that his decision was arbitrary or capricious. The law judge's credibility choices are not vulnerable to reversal on appeal simply because respondent offers an alternative explanation that he insists is more probable. Administrator v. Klock, NTSB Order No. EA-3045 at 4 (1989).

Respondent also claims that the law judge improperly shifted the burden of proof to respondent to show that he was not piloting the aircraft on November 13. The Administrator disagrees, maintaining that he presented prima facie evidence to show that respondent operated the aircraft and, therefore, the burden of going forward with evidence that someone other than respondent operated N3DT on November 13 rests with respondent. First, the Administrator emphasizes, three witnesses testified that a two-toned small, high-winged aircraft flew at low altitude in the Judith Landing area over them and their vehicle on October 25 and 26. Respondent admitted that on those dates, he piloted N3DT, an aircraft that met the witnesses' description, encountered hunters, and shouted out the aircraft window at one person. Two additional witnesses testified that they saw an aircraft on November 13 flying over the Judith Landing area. Their description of the aircraft was substantially similar to the aircraft described by the three other witnesses. One stated that he wrote down the registration number, N3DT. (Tr. at 197.) Respondent testified that he may have piloted the aircraft on November 13, or he may not have, but he could not say with

reasonable certainty. He also stated that one other person on the ranch was authorized to use the aircraft. The law judge saw this as sufficient evidence, given the pattern of conduct related in the first instance, the description of the aircraft, and respondent's statement that only one other person was authorized to operate the aircraft, to support a prima facie case that respondent was the pilot-in-command of N3DT on November 13, as well as sufficient to shift the burden of proof on the issue of pilot identity to respondent as owner and principal operator of the aircraft. We are constrained to disagree with the law judge's conclusion.

While the Administrator proved by a preponderance of the evidence that the aircraft at issue on November 13 was N3DT, he did not prove that respondent was the pilot of the aircraft on that date. Respondent testified that one other person on the ranch was authorized to operate N3DT. The Administrator did not present testimony from this person, and offered no evidence to prove that it was respondent who acted as pilot-in-command of the aircraft on November 13. The law judge relied on Administrator v. Starr, 3 NTSB 2962 (1980), to support his conclusion. In Starr, the Administrator presented testimony of an eyewitness who saw the respondent's aircraft arrive with two persons on board. A few minutes later, the respondent's wife rented a car from the witness; later that evening, the respondent and his wife returned the car and bought fuel for the aircraft. The witness then saw the aircraft taxi out of the airport with two people on board.

The Board found that it was not highly speculative for the law judge to presume that the respondent operated the aircraft, given the circumstantial evidence.[7] Such compelling evidence was not offered here.[8] Therefore, we find Starr factually inapposite to the instant case and must conclude that the Administrator did not prove by a preponderance of the evidence that respondent operated N3DT on November 13.

Respondent charges government wrongdoing in both the investigation and prosecution of this case. Specifically, he alleges that a BLM employee must have performed an illegal search

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[7]In Starr, the law judge drew a logical inference as to pilot identity from uncontroverted testimony establishing a prima facie case. Given the circumstantial evidence, it then was up to the respondent to rebut this presumption. We stated:

> [Since] evidence bearing on pilot identity questions is generally within the knowledge of respondent ... circumstantial evidence that the respondent was in the plane, and the absence of any evidence that another passenger held a valid pilot's license, has been held sufficient to sustain a prima facie case. The burden of going forward with evidence to show that someone else acted as pilot then rests with the respondent.

Id. at 2964. See Administrator v. Owens, 4 NTSB 907, 909 (1983) aff'd, 734 F.2d 399 (8th Cir. 1984)("the Board deals with the issue of pilot identity on a case by case basis and ... each must be decided on its own unique set of circumstances"). On appeal, the Eighth Circuit noted that circumstantial evidence may be used to prove pilot identity. Id. at 401. See also Administrator v. Kato, 4 NTSB 656, 658 (1982)(flight plan filed in respondent's name for aircraft owned by company headed by respondent created a reasonable inference that respondent operated the aircraft).

[8]The Administrator presented neither testimony from the only other person authorized to operate N3DT, nor evidence of any attempts to interview that person. Such evidence, in conjunction with the other evidence introduced at the hearing, likely would have been sufficient to shift to respondent the burden of showing that someone other than respondent piloted the aircraft.

of PN Ranch in order to obtain the aircraft's registration number. Whether BLM did or did not enter respondent's property without permission to obtain the aircraft registration number is not a matter appropriate for Board review. The registration of the aircraft was independently established through FAA records. In any event, respondent admitted that he flew over the hunters and their vehicle on October 25 and 26.

Respondent further alleged that counsel for the Administrator coached the witnesses and improperly allowed them to prepare their testimony collectively. Testimony revealed that FAA counsel met with the witnesses together the day before the hearing. However, there is nothing in the record to indicate that the Administrator's counsel encouraged the witnesses to be less than honest in their testimony. Cross-examination is the appropriate tool for uncovering improper coaching of witnesses or collaboration of testimony.[9] A revelation that witnesses have been improperly coached would necessarily affect a fact-finder's credibility determination. Nothing elicited from the witnesses on cross-examination in the instant case, however, suggests that any witness changed his or her statement after the pre-hearing meeting. The testimony of these witnesses remained entirely consistent with their statements given shortly after the

[9]See Geders v. United States, 425 U.S. 80, 89-90 (1976) ("The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses... Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility....")

incidents occurred. In addition, it is obvious that the law judge was aware of the situation and took it into consideration when assessing credibility.[10]

Respondent also claims that the FAA attorney improperly withheld crucial evidence in contravention of an ongoing discovery request, specifically, a card upon which Mr. Burns wrote "N3DT" on November 13. The FAA attorney stated that he only became aware of the card's existence the afternoon before the hearing. While the Administrator concedes that this is no excuse for the failure to alert respondent's counsel, he maintains that the error was harmless. The card was not introduced into evidence and the FAA attorney stated that he had no intention of introducing it as an exhibit, but rather, only chose to use it to refresh Mr. Burns' recollection.[11] We agree that the error was harmless. If respondent was unprepared to cross-examine the witness upon learning of the existence of the card, the proper remedy would have been to ask for a continuance. Respondent's claim that he was denied due process is unsupported by the record. In any event, our disposition of the November 13 incident renders this issue moot.

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[10]Written statements of Reed Tacia, dated November 14, 1992; Stan Grovdahl, dated December 5, 1992; and Doug Tacia, undated, were consistent with their testimony. (Exhibits (Ex.) R-2, R-4, and R-5.) Also, a BLM report which contained a summary of interviews with all the witnesses taken between October 27 and November 19, 1992, was consistent with their testimony at the hearing. (Ex. R-7.)

[11]According to the BLM record of an interview with David Burns that took place on November 19, 1992, Mr. Burns stated that the registration number of the aircraft was N3DT. (Ex. R-7.)

With respect to sanction, respondent argues that 180 days is excessive. In light of our dismissal of the charges related to the November 13 incident, this argument may be seen to gain even more force. Nevertheless, the facts found by the administrative law judge demonstrate a deliberate and repeated misuse of an aircraft. Whether these actions were to identify trespassers, as alleged by respondent, or intimidate them and drive off game, as supposed by complaining witnesses, the fact of the intentional low flights shown on this record is quite serious. The law judge found, and the evidence supports, that respondent's actions on October 25 and 26 were reckless. In addition, the Administrator noted that findings of multiple violations justify higher sanctions. Each incident consisted of several low passes over persons and property. An examination of Board precedent reveals that low-flight cases have warranted varied sanctions, depending on the severity and deliberate nature of the conduct.[12] In fact,

[12]See e.g., Administrator v. Ramstad, NTSB Order No. EA-4047 (1993) (180 days; respondent intentionally operated his aircraft 40 feet over a person at a camp site); Administrator v. Paradowski, NTSB Order No. EA-3962 at 4, n. 6 (1993)(120 days for two passes about 100 feet over nude beach; we found the sanction, while high, was not inconsistent with precedent); Administrator v. Flowers, NTSB Order No. EA-3840 (1993)(ALJ reduced suspension from 180 to 90 days for two incidents of low flight over residences; Administrator did not appeal the reduction); Administrator v. Roberts, 5 NTSB 2241 (1987)(60-day suspension for eight to ten low level passes over congested area); Administrator v. Steel, 5 NTSB 239 (1985) (180 days for deliberate low flight and steep turns over persons and property); Administrator v. Jorden, EA-4037 (1993)(180 days for repeated low flight over a crowded football stadium (respondent did not appeal the sanction period)); Administrator v. Owens, 4 NTSB 907 (1983), aff'd, 734 F.2d 399 (8th Cir. 1984)(180 days for flight 35 feet above hilly terrain and vehicles, one of which ran off the road).

the Board has described as "exceptionally lenient" a 180-day suspension for low flight involving deliberate, reckless conduct. Administrator v. Dopp, 4 NTSB 1489, 1490 (1984).[13] A suspension of 180 days is consistent with Board precedent for deliberate low altitude (buzzing) cases.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to strike is granted, and the documents attached to respondent's appeal brief are stricken;

2. Respondent's appeal is granted, with respect to the incident of November 13, 1992;

3. The initial decision is affirmed with respect to the incidents of October 25 and 26, 1992; and

4. The 180-day suspension of respondent's airman certificate shall begin 30 days after service of this order.[14]

HALL, Chairman, HAMMERSCHMIDT and FRANCIS, Members of the Board, concurred in the above opinion and order.

[13]In Dopp, the respondent deliberately made several extremely low passes over people operating model airplanes, clearly in an attempt to frighten them.

[14]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).